

Private Company Report

Key Issues Impacting Private Companies

Overview

This edition of Private Company Report highlights critical updates and regulatory changes affecting private companies, including AI liability, sustainability reporting, pregnant worker protections, Delaware law amendments, new DOJ whistleblower programs, and significant litigation rulings. Staying informed on these topics is crucial for effective compliance and strategic planning.

Highlights include:

- **AI Liability:** The DOJ is exploring criminal liability for AI systems acting autonomously.
- **FTC Non-Compete Ban:** Recent rulings and challenges, including a preliminary injunction in Texas.
- **Pregnant Workers Fairness Act:** EEOC final regulations effective June 18, 2024.
- **Delaware Law Amendments:** Changes in response to recent Chancery Court decisions.
- **Litigation Updates:** Supreme Court ruling on Rule 10b-5.
- **Legislative Regulations:** Amendments to PAGA and new Workplace Violence Prevention requirements in California.
- **Key Considerations:** Select questions to consider based on other legal updates in the quarter.

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AI Spotlight

Corporate Criminal Liability for Artificial Intelligence (AI)

Overview: As AI continues to evolve, it brings both opportunities and challenges. One significant challenge is determining criminal liability when AI systems violate the law, particularly in cases where there is no intentional human misconduct. The Department of Justice (DOJ) is exploring how to approach crimes committed by AI, but many questions remain unanswered, especially regarding who should be held accountable when an AI system acts autonomously.

Key Points:

- **Regulatory Focus:** U.S. regulators are issuing policies to govern AI usage and mitigate risks like fraud and discrimination.
- **Enforcement Challenges:** Determining liability when AI systems commit legal violations without direct human intent.
- **Future Considerations:** Companies must stay ahead of regulatory developments and ensure robust compliance frameworks are in place to manage AI-related risks.

For an in-depth discussion, see our [recent article on corporate criminal liability for AI](#).

Other Regulatory Updates

FTC Non-compete Ban & Current Challenges

Overview: On April 23, 2024, by a vote of 3 to 2, the Federal Trade Commission (“FTC”) adopted a Non-Compete Clause Rule (the “Rule”) prohibiting most employee non-compete agreements as unfair methods of competition. The Rule is a somewhat narrowed version of the regulation proposed in January 2023, which was subject to a 90-day public comment period. This marks the FTC’s most notable attempt to date to use its authority under Section 5 of the FTC Act to expand enforcement efforts into new areas of the economy.

Key Points:

- **FTC’s Position:** FTC Chair Lina Khan emphasized the negative impact of non-compete agreements on working conditions, labor markets, and innovation, arguing that these agreements rob individuals of economic liberty.
- **Legal Challenges:** Legal challenges are anticipated, and employers should take steps to minimize exposure and protect their interests.

Texas Injunction Update: On July 3, 2024, the Northern District of Texas issued a preliminary injunction in *Ryan, LLC v. FTC*, postponing the effective date of the Rule as applied to the plaintiffs. The court found that the FTC lacks substantive rulemaking authority under Section 6(g) of the FTC Act regarding unfair methods of competition. The court intends to rule on the ultimate merits of this action by August 30, 2024.

For more information, please see our [April client alert](#) and [alert update](#), as well as the [Texas preliminary injunction client alert](#).

EEOC Issues Final Regulation on Pregnant Workers Fairness Act

Overview: The Equal Employment Opportunity Commission (EEOC) issued final regulations to implement the Pregnant Workers Fairness Act (PWFA), effective June 18, 2024. This act requires employers to provide reasonable accommodations for limitations related to pregnancy, childbirth, or related medical conditions.

Key Points:

- **Reasonable Accommodations:** Employers must provide reasonable accommodations unless it causes undue hardship.
- **Expansive Coverage:** Covers a wide range of conditions related to pregnancy and childbirth.
- **Employer Obligations:** Employers need to update their policies and training programs to comply with the new regulations.

For more detailed information, refer to our [client alert on the PWFA](#).

Delaware Law Update

Proposed Amendments to DGCL Adopted in Response to Recent Delaware Chancery Court Decisions

Overview: On March 28, 2024, proposed amendments to the Delaware General Corporation Law (DGCL) were released, responding to recent Chancery Court decisions. These amendments aim to align statutory provisions with current market practices.

Key Amendments:

- **Stockholder Agreements (§122(18)):** In response to the *Moelis case*, the update clarifies that corporations can enter into stockholder agreements, provided they receive adequate consideration and do not violate the corporation's charter. For a more fulsome analysis of the decision in *Moelis*, please see our [client alert](#).
- **Board and Stockholder Approvals (§147, §232(g), §268):** Updates the approval process for mergers and other agreements, allowing ratification of agreements deemed "substantially final" in response to the recent *Activision case*. For a further discussion on the decision in *Activision*, please see our March 2024 edition of [Public Company Watch](#).
- **Penalties for Failed Mergers (§261(a)(1)):** Allows for specific penalties in the event of a failed merger, including damages and termination fees.
- **Stockholders' Representatives (§261(a)(2)):** Permits the appointment of a stockholders' representative with exclusive authority to enforce rights post-merger.

Key Takeaway: The proposed amendments aim to bring the provisions at issue in recent Delaware Chancery Court decisions in line with developing market practice by clarifying or expressly authorizing certain actions and processes available to a corporation. As such, for the most part, the proposed amendments may not result in considerable changes to market practices, with the exception of the amendments related to penalties for a failed merger, which may affect the allocation of risk in a merger transaction.

Litigation Corner

Supreme Court Rules Pure Omissions Not Actionable under Rule 10b-5

Overview: In April 2024, the U.S. Supreme Court ruled in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.* that pure omissions are not actionable under SEC Rule 10b-5(b). This decision resolves a circuit split and clarifies that an issuer's failure to disclose information is not sufficient for a securities fraud claim unless it involves a half-truth.

Key Points:

- **Pure Omissions:** Non-disclosure of information is not actionable unless it creates a misleading half-truth.
- **Implications:** This ruling provides clarity on the scope of disclosure obligations under Rule 10b-5.

For more details, see our [client alert on this Supreme Court decision](#).

Legislative Spotlight

California Legislature Steps In to Rewrite PAGA, Avoiding Ballot Measure

Overview: California lawmakers have proposed amendments to the Private Attorneys General Act (PAGA) through SB 92 and AB 2279, addressing concerns raised by employers and avoiding a ballot measure on PAGA reform.

Key Changes:

- **Standing Requirements:** Plaintiffs can only bring claims for violations they personally suffered.
- **Statute of Limitations:** Violations must have occurred within one year of filing a PAGA claim.
- **Penalty Structure:** Increased penalties allocated to aggrieved employees and revised penalties for minor violations.

- **Proactive Compliance:** Incentives for employers to audit practices and quickly address violations.
- **Manageability:** Courts can limit the scope of claims to ensure they can be effectively tried.

These amendments provide employers with tools to manage PAGA claims and encourage proactive compliance.

For more details, see our [client alert on PAGA amendments](#).

SB 553: California's Workplace Violence Prevention Law Taking Effect Today

Overview: On September 30, 2023, Governor Newsom signed Senate Bill 553 (the "Workplace Violence Prevention Act" or "WVP Act"), which requires most California employers to develop and implement comprehensive Workplace Violence Prevention Plans.

Key Requirements:

- **Workplace Violence Prevention Plan:** Tailored plans for each covered site, including procedures for identifying, evaluating, and correcting workplace violence hazards.
- **Training Program:** Regular workplace violence training accessible to all employees.
- **Incident Logs:** Detailed logs of every workplace violence incident.
- **Recordkeeping:** Maintain records of hazard identification, incident logs, and training for specified periods.

Employers should stay updated on regulatory developments and ensure compliance with these requirements.

For more details, see our [client alert on SB 553](#).

Key Considerations for Private Companies Based on Recent Legal Updates

Regulatory Compliance and Risk Management:

- Have you evaluated how the EU AI Act and new state-specific data privacy laws might impact your operations? What steps have you taken to ensure compliance with these evolving regulations?
- Have you reviewed your risk management strategies in light of the latest FTC focus on tracking technologies and data privacy enforcement?
- **Corporate Governance and Board Practices:**
 - How are you ensuring your board minutes and other corporate records are sufficiently detailed to protect against potential legal challenges, as highlighted by recent Delaware court rulings?
- **AI Management:**
 - Have you ensured that the data used for training your AI models complies with copyright laws, terms of service, and other legal statutes regarding data acquisition and use? What steps have you taken to verify the legality of your data sources?
 - Are your employment and contractor agreements robust enough to secure IP ownership rights, including explicit IP assignment clauses for all facets of AI innovation? How do you manage and review previous agreements to identify any existing IP encumbrances?
- **Employment Law and Workforce Management:**
 - How are you adapting to the implications of the Pregnant Workers Fairness Act and other recent employment law changes?
 - Have you developed a comprehensive workplace violence prevention plan in compliance with laws like California's SB 553, as advised in recent alerts?



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